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7 **UNITED STATES DISTRICT COURT**
8 **DISTRICT OF NEVADA**
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10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 FELIPE MARTINEZ,

14 Defendant.
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Case Nos. 2:04-CR-00286-KJD-GWF
2:05-CV-01527-KJD-GWF

ORDER

16 Presently, the Court has before it the Government's Motion to Dismiss Defendant's "Notice
17 to Vacate, Set Aside or to Modify a Sentence" (#60). More than fifteen days have passed and
18 Defendant has yet to file an opposition. Failure to oppose a motion constitutes consent to the
19 granting of the motion. See LR 7-2(d); LCR 47-9. Moreover, good cause exists for dismissing
20 Defendant's § 2255 motion. A district court should not entertain a habeas corpus petition while there
21 is a direct appeal pending. See Feldman v. Henman, 815 F.2d 1318, 1320 (9th Cir. 1987); see also
22 Tripathi v. Henman, 843 F.2d 1160, 1162 (9th Cir. 1987) (stating that "no defendant in a federal
23 criminal prosecution is entitled to have a direct appeal and a section 2255 proceeding considered
24 simultaneously in an effort to overturn the conviction and sentence.") "The reason for this rule is
25 that 'disposition of the appeal may render the [habeas corpus writ] unnecessary.'" Feldman, 815
26 F.2d at 1320. Here, Defendant's direct appeal is still pending. Accordingly, the Court must refrain

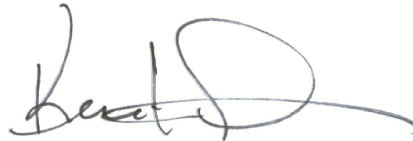
1 from hearing Defendant's § 2255 motion. See United States v. LaFromboise, 427 F.3d 680, 686 (9th
2 Cir. 2005) (recognizing but not resolving whether dismissal in this situation is based on a lack of
3 jurisdiction or simply a prudential concern).

4 Accordingly, IT IS HEREBY ORDERED that Government's Motion to Dismiss Defendant's
5 "Notice to Vacate, Set Aside or to Modify a Sentence" (#60) is **GRANTED**.

6 IT IS FURTHER ORDERED that Defendant's Motion to Vacate, Set Aside or To Modify
7 and Correct Sentence by a Person in Federal Custody, under Title 28 U.S.C. § 2255 (#55) is
8 **DISMISSED WITHOUT PREJUDICE**.

9 DATED this 2nd day of May 2006.

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Kent J. Dawson
United States District Judge